No. 12765.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANLEY WALTER ADAMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Preliminary Statement.

Appellant was convicted of the crime of perjury in the District Court of the United States for the Southern District of California based upon an indictment charging that he committed perjury when he testified before the United States Grand Jury that he was in the barber shop on Sunset Boulevard near Laurel Canyon in the City of Los Angeles on February 28, 1950 [Clk. Tr. p. 2]. Said indictment alleged that one Abraham Davidian was a co-defendant in Case No. 21101, pending in said United States District Court, and that said Davidian, who was a Government witness in said case, was murdered on February 28, 1950, in Fresno. The Government's theory of materiality [Rep. Tr. p. 18] was that appellant had a motive to falsely testify before the Grand Jury in its

inquiry into a possible obstruction of justice, for the said Abraham Davidian was to be a Government witness in Case No. 21101 in which this appellant was also a co-defendant.

Statement of Facts.

In analyzing the facts upon which the conviction is based, we shall only refer to the testimony most favorable to the Government. The appellant vigorously denied the charge and produced a number of witnesses to establish the truth of his testimony before the Grand Jury to the effect that he was in the barber shop on February 28th in accordance with his testimony before the Grand Jury. In that this testimony was rejected by the jury, we shall not reargue before this court matters that were resolved against the appellant by the jury and by the trial judge on his denial of appellant's motions for acquittal, directed verdict and new trial. We desire, however, at this time to point out to the court that the testimony in the trial court was in sharp conflict. This should be borne in mind, for any errors would of necessity be prejudicial to appellant.

To establish its charge of perjury, the Government caused appellant's testimony before the Grand Jury, which was given on August 10, 1950 [Rep. Tr. p. 24] to be read to the jury [Rep. Tr. p. 32]. Thereupon, the Government called Erwin Sharpe, who testified he was a barber; that he was employed in his brother's barber shop at 8021 Sunset Boulevard, in Los Angeles, California, which is close to the corner of Laurel Canyon [Rep. Tr. p. 38]; that he was acquainted with the appellant, and that during the early part of 1950 he had cut appellant's hair on two occasions [Rep. Tr. p. 40]. *He said that the first occa-*

sion that he had cut his hair was some time in February, 1950 [Rep. Tr. p. 40]. He further testified that the barber shop had four chairs and that he serviced the third chair from the front of the shop [Rep. Tr. p. 41]. That the first occasion that appellant had been in the barber shop was in the late evening about 5:30 P. M. [Rep. Tr. p. 41] and that at the time appellant first came into the shop his brother, George Sharpe, serviced the first chair, and that the second chair was being serviced by Frank Riggi [Rep. Tr. p. 41]; that on this first occasion that appellant came to the barber shop he had a little dog with him. When asked to fix the date, this witness stated that the first visit of appellant to the barber shop was on Thursday, February 28 [Rep. Tr. p. 43]. A calendar was then shown to the witness [Rep. Tr. p. 44] and the court stated that it would take judicial notice of the fact that February 28th was a Tuesday and March 2nd was a Thursday. The witness thereupon stated that the first visit of appellant to the shop must have been on Thursday, March 2nd [Rep. Tr. p. 44]. To this the witness said that he was sure. After a short recess [Rep. Tr. p. 45], the witness was further interrogated and testified that he recalled that he was off on March 1st.

On cross-examination, this witness testified that appellant made a further visit to the barber shop about a week after the first visit [Rep. Tr. p. 47] and made a third visit to the barber shop about a month after the second visit [Rep. Tr. p. 48], and that on said third occasion he had again cut appellant's hair. On this third visit appellant had with him some private investigators [Rep. Tr. p. 50] and there was considerable testimony as to the conversations between the private investigators and this

witness [Rep. Tr. p. 41]. This witness further testified that on the first occasion of appellant's visit to the barber shop, the radio program "Life with Luigi" was not on [Rep. Tr. p. 54], but that the Gabriel Heater newscast was tuned in on the barber shop radio [Rep. Tr. p. 55]. It is interesting to note that this witness testified that on appellant's second visit to the barber shop the radio program "Life with Luigi" was turned on, and that appellant remained to hear the end of the program [Rep. Tr. p. 80].

It is also interesting to note that the witness previously testified that the second visit was approximately one week after the first visit. At this time we also point out that the testimony of the witness Francis William Beckinsale, the Service Manager of the Columbia Broadcasting Company, clearly disclosed that the "Life with Luigi" program was regularly broadcast during the time in question, on Tuesday nights from 6:00 to 6:30 o'clock, P. M. Thus, if the second visit made by the appellant to the barber shop was one week after the first visit, and the "Life with Luigi" program was being played on the radio in the barber shop at the time of the appellant's second visit, it is reasonable to assume that appellant first visited the barber shop on a Tuesday, rather than a Thursday. We are not attempting to re-try this case before this Honorable Court nor to ask the court to usurp the functions of the jury which has already resolved the conflicts and testimony, but we point out these details to indicate how unsatisfactory the Government's witnesses were so that we may urge that as a matter of law there was no definite, certain and clear testimony before the jury from which it could possibly arrive at a verdict of guilty. It is appel-

lant's position that the record is devoid of the necessary quantum of proof to support the perjury conviction.

To summarize the testimony of the witness Erwin Sharpe, the witness testified that the first occasion when he cut the appellant's hair in the barber shop was some time in February, 1950. Then the witness testified that Adams was in the barber shop for the first time on Thursday, February 28, which he later changed to March 2nd; that Adams returned to the barber shop about a week later and made a third visit about a month later. He testified that on the occasion of the third visit Adams had two investigators with him, Messrs. Kliman and Paneno; that on the first visit appellant made to the barber shop the Gabriel Heater news program was on the air, and not the program, "Life with Luigi," but that on Adams' second visit to the barber shop, made a week after the first visit, the program "Life with Luigi" was being heard on the barber shop radio.

The next witness called by the Government was George Sharpe, who testified that he was the owner of the barber shop at 8021 Sunset Boulevard in Los Angeles [Rep. Tr. p. 88] and that there are four chairs in the barber shop, but only three serviced by barbers; that he, George Sharpe, handled the first chair, that Frank Riggi serviced the second chair, and that his brother, Erwin Sharpe, was at the third chair. He testified that the first time appellant was in the barber shop was on March 2nd [Rep. Tr. p. 89] and that that was a Thursday, and that both Frank Riggi and Erwin Sharpe were there on that day; that appellant received a hair cut from Erwin Sharpe at about 5:30 o'clock in the evening [Rep. Tr. p. 90]. *This witness testified that he was not in the shop on*

February 28, 1950, as that was his day off, and that February 28 was a Tuesday [Rep. Tr. p. 90]. *This witness testified that he did not know whether appellant was in the barber shop or not on February 28* [Rep. Tr. p. 91]. This witness fixed Thursday as the day upon which appellant was in the barber shop by drawing an inference [Rep. Tr. p. 115]. He said he wasn't there on Tuesday, and his brother, Erwin, wasn't there on Wednesday, so it must have been Thursday *or Friday* [Rep. Tr. p. 115]. This witness also testified that appellant was in the barber shop a short time after the first visit [Rep. Tr. p. 122], and that there was also a third visit. This witness also testified that on one of appellant's visits to the barber shop the program "Life with Luigi" was turned on [Rep. Tr. p. 133]. This witness also testified that the "Life with Luigi" program was heard prior to the Gabriel Heater program on the same radio station, KNX [Rep. Tr. p. 138].

We specifically direct the court's attention to this witness's obviously incorrect testimony in connection with the times and stations on which the two radio programs, *i.e.,* "Gabriel Heater" and "Life with Luigi," were broadcast, merely for the purpose of demonstrating the uncertainty and confusion existing in this witness's mind. We further desire to point out that this witness added nothing to the testimony of Erwin Sharpe, as his only means of fixing the time or times that Adams was in the barber shop was by his own process of mental dead-reckoning. He testified that he was not in the barber shop on Tuesday, so, therefore, Adams had to be there on Thursday or Friday, but this witness clearly stated that he had no

personal knowledge of whether or not Adams was in the barber shop on Tuesday, February 28.

To summarize this witness's testimony, he said that he did not know whether or not Adams was in the shop on February 28th, as that was his day off; that he recalled Adams' being in the shop on Thursday or Friday, being serviced by his brother, Erwin Sharpe, and that he fixed the day as a Thursday or Friday because he was off on Tuesday and Erwin was off Wednesday. He also testified that appellant was in the barber shop on two other occasions and that on one of these occasions the program "Life with Luigi" was being broadcast in the barber shop.

The Government thereupon called Frank Riggi, who testified that he was employed as a barber in the barber shop at 8021 Sunset Boulevard [Rep. Tr. p. 144], and that he serviced the second chair and his employer, George Sharpe, handled the first chair, and that the third chair was serviced by Erwin Sharpe [Rep. Tr. p. 143]. He said that he recalled that the first time appellant was in the shop it was late in the afternoon and that Erwin Sharpe cut his hair, and that George Sharpe was present on said date; that appellant had a little dog with him at the time [Rep. Tr. p. 144]. That he recalled appellant being in the barber shop for the second time when he cut appellant's hair [Rep. Tr. p. 145], *but that he could not fix the date* [Rep. Tr. p. 145]. *The witness further testified, in response to the questioning of the court, that he could not remember the day of the week or the date that appellant was in the barber shop for the first time* [Rep. Tr. p. 145].

To summarize this witness's testimony, he merely testified that he saw the appellant in the barber shop on two

occasions, on one of which Erwin Sharpe cut his hair, and on the second occasion this witness cut appellant's hair. *His testimony is completely negative as to days or dates when appellant was in the barber shop.*

Thereupon Indictment No. 21101 was received in evidence *over the objection of appellant* [Rep. Tr. p. 147]. It was thereupon stipulated that Abraham Davidian was to be a witness for the Government in Case No. 21101, and that he died by violent means on February 28, 1950 [Rep. Tr. p. 149].

The foregoing constituted the Government's case, and at the close thereof a motion was made for a judgment of acquittal pursuant to Rule 29 of the Rules of Criminal Procedure [Rep. Tr. p. 151], which motion was denied by the court [Rep. Tr. p. 153].

The other evidence introduced at the trial consisted of the defendant's testimony in which he asserted that he was in the barber shop on the date he testified that he was there before the Grand Jury [Rep. Tr. p. 154], and the testimony of his corroborating witnesses, whose testimony will not be adverted to, as had it been believed, appellant would have been acquitted by the jury. We do, however, want to point out the testimony given by Francis William Beckinsale, Service Manager of the Columbia Broadcasting Company [Rep. Tr. p. 229], who testified that the program "Life with Luigi" during the times in question in this case was released *weekly over radio station KNX on Tuesday from 6:00 to 6:30 o'clock, P. M.* [Rep. Tr. p. 234], *and that the Gabriel Heater program is not released by KNX but is released through the Mutual Broadcasting Company* [Rep. Tr. p. 233].

ARGUMENT.

We shall divide our argument into three phases:

(a) That the alleged perjury of appellant was not proved by the testimony of two witnesses, or one witness and corroborating circumstances, as required by law.

(b) That appellant was prejudiced by having the jury instructed that they could consider the indictment in Case No. 21101 for the purpose of determining whether appellant's testimony before the Grand Jury was knowingly and wilfully perjurious.

(c) That appellant was prejudiced by having the jury receive instructions from a jury handbook in the jury room outside of the presence of appellant.

I.

The Alleged Perjury of Appellant Was Not Proved by the Testimony of Two Witnesses, or One Witness and Corroborating Circumstances, as Required by Law.

The court will note that we carefully parsed the testimony of the three barbers, since it is the only testimony touching upon the alleged perjury. *The Government's case must rise or fall upon the said evidence.* Apparently the Government regards the testimony of Erwin Sharpe as the direct testimony to establish the perjury. It should be borne in mind that the charging part of the indictment is that appellant was guilty of perjury by falsely testifying before the Grand Jury that he was at a particular barber shop on Sunset Boulevard on February 28, 1950. The date is of the utmost importance, for the testimony clearly

establishes that he was in the barber shop on three occasions, so as a matter of law the date cannot be disregarded. *Therefore, it was the duty of the Government to establish either by two direct witnesses or one witness and corroborating circumstances that appellant was not in the barber shop on February 28, 1950.* We submit that the Government fell far short of this kind of proof. Erwin Sharpe did not testify that appellant was not in the barber shop on February 28th. In fact, he testified *in direct examination* that he first cut appellant's hair some time in February, and that appellant was in the barber shop on February 28th [Rep. Tr. p. 43], and then attempted to correct his testimony that it was on a Thursday that appellant was in the barber shop, and by use of the calendar reached the conclusion that it was Thursday, March 2nd. He further testified that appellant was in the barber shop a week later, and then a month later [Rep. Tr. pp. 48 and 50]. Now, if we accept this as direct testimony that appellant was not in the barber shop on February 28th, which is rather difficult upon a fair reading of the record, is there more than one witness who directly testified that appellant was not in the barber shop on February 28, 1950? The answer to this query is obviously and emphatically in the *negative,* because George Sharpe testified that he did not know who was in the barber shop on February 28th, as that was his day off [Rep. Tr. p. 91]. Further, Frank Riggi could give no direct testimony, as he was completely unfamiliar with days or dates [Rep. Tr. p. 145].

Thus, by the simplest processes of deduction, the best that the Government can claim is that it has one witness to the perjury. This we even question in view of the

uncertain character of Erwin Sharpe's testimony as to dates. Assuming, for the purpose of this argument, that Erwin Sharpe's testimony directly established perjury, was it in any way corroborated? Certainly, Riggi's testimony constituted no corroboration, because he could fix no dates. *By drawing an inference from an inference,* the best that Riggi's testimony establishes was that all three barbers were on duty when appellant came into the barber shop. This cannot be the basis of corroboration, as will be hereafter pointed out in the citation of authorities. Also, George Sharpe certainly does not corroborate that appellant was not at the barber shop on February 28th, since he was not there that day and didn't know who was in the barber shop; and his testimony that the appellant must have been in the shop on Thursday or Friday is wholly unsatisfactory since it is based on the inference that since he, George Sharpe, wasn't there on Tuesday, and his brother, Erwin, wasn't there on Wednesday, it must have been Thursday *or Friday.*

We shall examine the authorities establishing the quantum of proof required in perjury cases and demonstrate that this case falls so short thereof that the conviction here before this court is shocking.

The law is quite clear that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused. The rationale of this rule seems to be that where you have two people taking diametrically opposed oaths, the oath of one cannot counteract the oath of the other.

Fraser v. United States, 145 F. 2d 145;
Weiler v. United States, 323 U. S. 606;
Pawley v. United States, 47 F. 2d 1024.

The law of perjury has ingrafted upon it the doctrine of corroboration so that if there are not two witnesses to the perjury, the testimony of one witness must be corroborated.

Weiler v. United States, 323 U. S. 606;
U. S. v. Seavely, 180 F. 2d 837;
Fotie v. United States, 137 F. 2d 831.

The troublesome question of law has always been that of corroboration. The following cases held that the corroboration was insufficient:

Fotie v. United States, 137 F. 2d 831;
Hart v. United States, 131 F. 2d 59;
Phair v. United States, 60 F. 2d 953;
Sullivan v. United States, 161 Fed. 253.

Corroborative testimony must raise more than a suspicion or opportunity to commit a crime. It must independently or any other evidence tend to connect the defendant with the commission of the offense.

People v. Woodcock, 52 Cal. App. 412, 418.

The rule definitely is that corroboration must offer proof of independent and material facts tending to establish the crime, and not mere corroboration in slight particulars.

Cook v. United States, 26 App. D. C. 427.

We desire to call the court's attention to two rather interesting cases. One is *Wilkerson v. State* (Tex.), 55 S. W. 49. There defendant was charged with having falsely testified that he did not have a pistol with him on a par-

ticular occasion. One person testified that defendant had a pistol with him. The person assaulted told his son that he had been attacked, and there was some evidence that defendant owned a pistol like the one used in the assault. There the court held that there was *no* legal corroboration.

Another interesting case is *Wright v. State*, 30 Okla. Cr. 425, 236 Pac. 633. There defendant was charged with having falsely testified he was not in a room at a time a murder had been committed therein. One witness testified that defendant was in the room at the time of the commission of the murder. Two other witnesses testified that they came into the room where the deceased lay and found the defendant therein. The court held that sufficient time had elapsed so that defendant need not have been in the room at the time of the commission of the offense and, therefore, held that the alleged perjury was not corroborated.

Applying the foregoing rules of law to the record here before the court, possibly one witness, viz., Erwin Sharpe, testified that defendant was not in the barber shop on February 28th. George Sharpe merely corroborated Erwin Sharpe to the effect that appellant was in the barber shop on Thursday, *but did not corroborate the essential ingredient that appellant was not in the barber shop on February 28th, for George Sharpe himself wasn't in the shop on that day. Riggi, the third barber, corroborates nothing, for he could not fix day or dates, and all three barbers definitely placed appellant in the barber shop on at least two, and possibly three, occasions.*

Were this court to weigh the testimony of the Government's witnesses, it would appear that all of their testimony is in sharp conflict. Erwin Sharpe testified that he gave appellant two haircuts. George Sharpe testified that Erwin gave Adams but one haircut, and Riggi adds his part to the confusion by claiming to have given Adams a haircut on one occasion. Add to this the utter confusion of the barbers in relation to the radio programs that were being heard on the various occasions when Adams was in the barber shop. The barbers not only had the radio programs on the wrong stations, but also were completely wrong as to the times when said programs were actually broadcast. While this court cannot weigh the testimony, it certainly can examine the record to find if there is any satisfactory testimony or proof of corroboration upon which the judgment of conviction is based.

We sincerely believe that there is a complete failure of testimony to establish any perjury, and there isn't any corroboration. While the Government may argue that the presence of three barbers is important, we submit that these are not items of corroboration. They might be extremely important if the appellant claimed that he was never in the barber shop, or that he had been there only once, but the perjury charged in this case relates solely and wholly as to whether or not he was there on February 28th, and that testimony must be corroborated. Search the record as we will, we find nothing except Erwin Sharpe's uncorroborated testimony that he believed that it was Thursday, February 28th, later changed to March 2nd.

II.

That Appellant Was Prejudiced by Having the Jury Instructed That They Could Consider the Indictment in Case No. 21101 for the Purpose of Determining Whether Appellant's Testimony Before the Grand Jury Was Knowingly and Wilfully Perjurious.

Among the various instructions by the court to the jury, there appears the following instruction:

> "I particularly emphasize to you that you are charged with the duty only and solely of determining whether or not the defendant is guilty or is not guilty of the crime of having wilfully and knowingly committed perjury before the grand jury on August 10th, 1950 as set forth in the indictment in this case: The defendant is not on trial before you for any of the charges contained in indictment No. 21101; that indictment will not go to the jury room with you; and you must not consider the nature of the charges therein set forth; nor is the defendant on trial before you or charged with the murder of Abraham Davidian in this or any other Court or of any complicity therein; nor is he on trial or charged in this or any other court with obstruction of justice. You cannot and must not in your deliberations speculate as to his guilt or possible connection with any of these three things, but you must accept the presumption that he is innocent thereof.
>
> "If, however, you find beyond a reasonable doubt, that he did testify falsely before the grand jury on August 10th, 1950 as charged, then, and then only, you may give consideration solely and only to the fact that indictment No. 21101 was returned against Adams and others before, and was pending on February 28th, 1950, and at all other times material to the

within charge of perjury, and to the fact that the grand jury was conducting a lawful inquiry on material matters on August 10th, 1950, in order for you to determine the state of mind of the defendant at the time of giving such testimony on August 10th, 1950, that is whether or not the defendant Adams, beyond a reasonable doubt, knowingly and wilfully intended to give such false testimony on August 10, 1950, before the grand jury." [Rep. Tr. p. 545 ff.]

In connection with the second paragraph of this instruction, it is the appellant's contention that the Court committed prejudicial error in so instructing the jury. Under this portion of the questioned instruction, the jury was told that they could consider the fact that the indictment in Case No. 21101 was returned against the appellant and others and was pending on February 28, 1950, and at all other times material to the within charge of perjury in passing upon the defendant's state of mind at the time he testified before the Grand Jury on August 10, 1950.

In connection with this instruction, which was given over the serious objection of appellant [Rep. Tr. pp. 499, 517], we direct the court's attention to the following facts:

1. The record in the instant case is entirely silent as to any connection between the appellant and the murdered Abraham Davidian, except that it would appear from the indictment No. 21101 that the appellant and Abraham Davidian, as well as numerous other persons, were co-defendants in said case.

2. Appellant Adams did not stand before the trial court charged with the murder of Abraham Davidian or with having any connection therewith, nor was he charged with or suspected of violating the Federal statutes relating to the obstruction of justice.

3. The record is entirely silent as to the time of day on February 28, 1950, when Abraham Davidian met his death in Fresno, California [Rep. Tr. p. 149].

4. This court, like the trial court, can take judicial notice of the distance between Fresno, California, and Los Angeles, California, and the time necessary to travel between the two cities by airplane, train, and/or automobile.

5. The indictment in the instant case was a catch-all to which appellant filed a motion to dismiss [Clk. Tr. p. 12], but the trial court at the time of trial limited the charging portion of the indictment to the sole issue as to whether Adams' testimony in relation to the barber shop incident was true or not.

6. Indictment No. 21101 charged the defendants named therein with violations of the Federal Narcotics Act, which charge had nothing to do with the instant perjury case. It is also interesting to note, even though it may be *dehors* the record, that since judgment was pronounced in this case Indictment No. 21101 has been dismissed.

With these uncontradicted facts in mind, we are at a loss to understand by what stretch of the imagination the trial court believed that it was permissible for the jury to consider the fact that the indictment had been returned in Case No. 21101 against the appellant and others. It would be just as logical for the Court to instruct the jury, were it a fact, that an indictment was pending against Adams in the Eastern District of Illinois for a violation of the Mann Act and that there was an indictment pending against Adams in the Western District of Missouri for a violation of the Income Tax laws. Obviously, the

last two mentioned examples would be prejudicial to the rights of the appellant, and we submit that the court's instruction in the instant case was even more so. At no time during the trial did the prosecution affer any evidence to show any motive on the part of the appellant to have murdered Abraham Davidian. Unless some such connection or motive was shown, there can be no excuse for the jury considering the indictment in Case No. 21101. Furthermore, it was extremely prejudicial for the jury to be told that they could consider pendency of an indictment the contents of which they did not know. For aught, said indictment could have charged Adams with any crime cognizable under any Federal law. The jury was thereby permitted to speculate and draw on its imagination as to the offense or offenses charged therein against the appellant.

In addition to the foregoing, we point out that at no time during the trial did the prosecution introduce any evidence as to the exact time of day on February 28, 1950, when Abraham Davidian was murdered in the City of Fresno. In view of this most important failure in the evidence, we are unable to see how or in what manner appellant's whereabouts at 5:00 or 6:00 P. M. on February 28th would be relevant or material to a grand jury investigation into a possible obstruction of justice in connection with the alleged murder of Abraham Davidian. If Davidian had been murdered at 8:00 A. M. on February 28th in the City of Fresno, it is entirely possible that a person could have made at least three or four round-trips by airplane between Fresno and Los Angeles by 5:00 or 6:00 P. M. on that day. Certainly, between 8:00 A. M. and 5:00 P. M. on the same day, a person can make a complete round-trip by train or automobile be-

tween Fresno and Los Angeles. We feel certain that the court will take judicial notice of these facts.

The connection between the Grand Jury's inquiry as to the whereabouts of appellant at 5:00 or 6:00 P. M. on February 28, 1950, and the murder of Abraham Davidian in Fresno at some unknown time on the same day, was never established during the trial of the instant case. Therefore, even assuming, but not conceding, that the appellant did not testify truthfully before the Grand Jury as to his whereabouts at 5:00 to 6:00 P. M. on February 28, 1950, wherein would such testimony be material in the instant case? The appellant does not stand charged with the murder of Abraham Davidian, nor was there any testimony offered in this case that he was a suspect in said murder, or, as we have previously pointed out, that he had a motive to murder the said Abraham Davidian in connection with the indictment in Case No. 21101, or otherwise.

In summation, appellant submits that the introduction into evidence of the indictment in Case No. 21101, and the court's instruction in connection therewith, as above quoted, could serve only to prejudice the jury against appellant, since the indictment could have no probative weight in enabling the jury to determine the appellant's state of mind at the time he testified before the Grand Jury. In effect, the challenged instruction constitutes a prosecution argument for conviction which could not have properly been made by the prosecuting attorney.

Before takning leave of this portion of our opening brief, we direct the court's attention to the case of *Chitworth v. U. S.*, 178 Fed. 442. That case was presented to the trial court in the instant case at the first mention by the prosecution of Indictment No. 21101, and while the

case is not on all four's with the instant case, it has great persuasive value and we believe that the court will gather a strong analogy when it examines the facts in the *Chitworth* case in relation to the instant case, and in particular to the point here under discussion. In view of the nature of the discussion in the *Chitworth* case, we will not attempt to paraphrase the same, but request that the court read the opinion in connection with its deliberations in the instant appeal.

III.

That Appellant Was Prejudiced by Having the Jury Receive Instructions From a Jury Handbook in the Jury Room Outside of the Presence of Appellant.

Following the return of the verdict in this case, appellant made his motion for a new trial and among the various grounds assigned for error, appellant urged therein:

> "8. The jury received instructions outside of the presence of the defendant and the court after the case had been submitted to them for their deliberations in that the jury resorted to the use of unauthorized written means of ascertaining the law applicable to the case." [Clk. Tr. p. 27.]

In support of this portion of said motion for new trial, the appellant presented the affidavit of juror J. J. Leach, which affidavit is found in the Clerk's Transcript beginning at page 29.

Before discussing this affidavit we point out that there were no answering or opposing affidavits filed by the prosecution that would in any way controvert or contradict juror Leach's affidavit. Therefore, it must be assumed for the purpose of this appeal that the facts con-

cerning the incidents mentioned in said affidavit are true and correct.

Since appellant considers the facts stated in the affidavit of juror J. J. Leach to be of the utmost importance in this case, and since said affidavit is relatively short, we have taken the liberty of quoting the entire affidavit herein, to-wit:

"UNITED STATES OF AMERICA
STATE OF CALIFORNIA
COUNTY OF LOS ANGELES—SS

J. J. LEACH, being first duly sworn, deposes and says:

That he resides at 1037 Louise Street, Arcadia, California, and that he was one of the trial jurors in the case of United States of America v. Stanley Walter Adams, tried in the above entitled Court before Judge Peirson M. Hall.

That affiant states that after said case was submitted to the jury for its deliberations, your affiant, being one of the members of said jury, the jury retired to the jury room for its deliberations; that affiant states that upon entering the jury room your affiant observed present in the jury room four or five booklets entitled 'A Handbook For Petit Jurors Serving in the District Courts of the United States', a true and correct copy of which handbook is attached to this affidavit as Exhibit 'A', and made a part hereof.

That your affiant states that he personally saw and observed a number of his fellow jurors reading said handbook during the course of the jury deliberations and that certain paragraphs contained in said handbook were read aloud by one or more of the jurors to other members of the jury from time to time during the course of the jury deliberations.

That your affiant states that the aforesaid handbooks were present in the jury room and used during the jury deliberations on both December 5th and December 6th, 1950.

That affiant states that he makes this affidavit freely and voluntarily of his own will and desire, without any force, duress or coercion, and that no promises of any payment or reward of any kind have been made or offered to him in connection therewith by anyone whomsoever.

Further affiant saith not.

s/ J. J. Leach
Affiant"

[Clk. Tr. pp. 29, 30.]

Thus it clearly appears from this uncontradicted affidavit that after the jury retired for deliberation, the said juror observed present in the jury box four or five booklets or handbooks entitled "A Handbook For Petit Jurors Serving in the District Courts of the United States." In connection with this handbook we direct the court's attention to the fact that a copy of said handbook was attached to juror Leach's affidavit and appears in the Clerk's Transcript beginning at page 31. We will, in subsequent portions of this brief, specifically point out to the court the appellant's numerous objections to the prejudicial statements contained in said handbook. However, we specifically call to the court's attention the statement contained in the affidavit of J. J. Leach to the effect that said juror personally saw and observed a number of his fellow jurors reading said handbook aloud to other jurors during the course of the jury deliberations both on December 5th and December 6, 1950.

In connection with the law on this subject, we believe that the authorities are uniform to the effect that a jury cannot be instructed outside of the presence of the defendant.

Fina v. U. S., 46 F. 2d 643;
Outlaw v. U. S., 81 F. 2d 805;
Little v. U. S., 73 F. 2d 861.

It is also a well recognized rule of law that extraneous matters that have not been received in evidence cannot be considered by a jury in its deliberations.

U. S. v. Douglas, 155 F. 2d 894;
Ogden v. U. S., 112 F. 2d 523;
Mattox v. U. S., 146 U. S. 140.

In connection with the jury handbook in question, we do not want the court to feel that we are adverse to jurors being instructed generally in their duties at the time of their impanelment on the venire. This entire question has been litigated and relitigated, and we feel that jurors should be properly instructed generally in their duties at the commencement of their service on the venire. However, the vice and prejudice that ocurred in the instant case was of an entirely different type and character. In this case the jurors actually considered and used, and even went so far as to read aloud from, the jury manual during the course of their deliberations in the jury room. It would have been the same kind of error had the jurors obtained or used a law book or a daily newspaper or sought to examine affidavits, or other documents that were not in evidence.

In the instant case we have a prosecution for perjury where the trial court very definitely by its instructions established the necessary quantum of proof and corrobor-

ation required for conviction. It is our firm belief that the pamphlet under discussion contains a number of statements in it which would have been prejudicial error had the same been included in the jury instructions given by the trial court. Therefore, for the purpose of determining the prejudice, if any, suffered by appellant herein, this court must necessarily consider the entire jury manual as additional instructions given to the jury. If the court should find that any portion of said manual would have been prejudicial as an instruction, it is then reversible error since it was considered by the jury during its deliberations.

Let us now turn to the jury handbook and point out the portions thereof which, in appellant's opinion and belief, constitute prejudicial error.

During the court's instruction to the jury, the court very properly instructed the jury that by the arrest of the defendant and the return of the indictment no presumption whatsoever arises to indicate that the defendant was guilty or that he had any connection or responsibility for the act charged against him [Rep. Tr. pp. 536-537]. However, notwithhstanding this proper instruction, the following statements appear in the jury manual:

> ". . . The indictment is the formal charge or accusation of at least 12 out of a group of citizens of the district which may vary in number from 16 to 23 jurors, who generally are chosen in the same way petit jurors are selected but who, by reason of their number, are specially designated as a grand jury. The grand jury meets in secret session. The United States attorney, who is the Government's prosecuting official, presents his charges before the grand jury and produces evidence to substantiate the charges. If after hearing such evidence, the grand jury be-

lieves that a crime has been committed and there is reasonable ground to believe that the defendant is responsible for the crime, it finds a true bill of indictment and presents it to the district court. These are technical phrases which mean that the grand jury believes that there is evidence which requires that the defendant be brought to trial on the charges set forth in the indictment . . ." [Clk. Tr. pp. 46, 47.]

* * * * * * * *

"A grand jury in the Federal courts is a body of from 16 to 23 jurors, usually chosen in the same way as petit jurors, whose duty it is, in private session, to examine the accusations against persons charged with crime, and if they see just cause, then to find bills of indictment against such persons to be presented to the court." [Clk. Tr. p. 60.]

The contrast between the court's proper formula instruction, above quoted, and the foregoing portions of the jury manual are most obvious. The effect of the above quoted portions of the manual upon the jurors reading the same in the jury room must of necessity tend to create prejudice against the appellant since the jury was specifically told that another tribunal had already found reasonable grounds to believe that the appellant was responsible for the crime as charged. This, of course, waters down the formula instruction that an indictment is a mere accusation and that the defendant is presumed to be innocent, to a mere shibboleth. Certainly, had the trial judge incorporated in his formula instruction the text of the manual above set forth, this court would without the peradventure of doubt reverse the judgment of conviction on this ground alone.

In addition to the above quoted prejudicial portions of the jury manual, we next direct the court's attention to the statement therein contained as follows:

> "Thus it is that, in performing jury service, a citizen is called upon to render a duty second in importance only to a soldier who defends his country upon the field of battle." [Clk. Tr. p. 36.]

Taking the foregoing text of the manual in connection with the comments we have made in relation to the function of a grand jury, the juror is led away from the instruction that he is a disinterested judge of the facts to a partisan position. By comparing the duties of jury service with that of a soldier defending his country upon the field of battle, certain fundamental emotional ties are played upon. The very caption of the case, to-wit: "United States of America v. Stanley Walter Adams," necessarily tends to heighten such emotions and tendencies and likens the defendant to an enemy of the United States. We all know the part the historically patriotic American soldier has played in the history of our country, wherein we have always held to the doctrine "My country, right or wrong." We could at far greater length dwell upon the vicious tendencies upon this type of statement being received and used by the jury in the jury room. Again, we state that had the trial judge included such language in his instructions there would be great prejudicial error as that language would completely dilute the instructions given to the jury that they are disinterested triers of the facts.

The next portion of the jury manual to which we want to direct the court's attention is in our opinion most prejudicial and undoes all of the instructions given by the trial court on the necessary proof in a criminal case and

the establishment of guilt beyond a reasonable doubt and to a moral certainty. As this court knows, proof in a perjury case is governed by special rules relating to corroboration,. The trial court went to great length to define the special rules applicable to perjury cases. However, when we consider the following quoted portions of the jury manual in connection with this portion of the court's charge, it clearly appears that when the jury reached the jury room and entered its deliberations, it then had before it for use during such deliberations the following prejudicial statements of the law:

> "What has been said about the procedure in the trial of civil cases, applies also in a general way to criminal trials." [Clk. Tr. p. 48.]
>
> * * * * * * * *
>
> "The duty of a jury in trying a criminal case is very similar to its duty in a civil case." [Clk. Tr. p. 48.]
>
> * * * * * * * *
>
> "Let us take now, for illustrative purposes, a typical civil case (we could as well take a criminal case, for the procedure, on the whole, is the same . . ." [Clk. Tr. p. 38.]

Again, the effect of the quoted text from the jury manual is to water down if not completely negative all of the important constitutional instructions that were given by the trial judge in the case. To tell the jury that the procedure in civil and criminal trials is essentially the same certainly is contrary to the law and must of necessity tend to improperly influence the jury.

At this time we want to point out to the court that we don't know what portion of the jury manual was read

and considered by the jury and even if we did know it would be improper to consider the particular portion of the manual that was read in the jury room. It is our considered view that if any portion of the jury manual was improper or tends to confuse, negative or modify the court's instructions given in the presence of the appellant, then the motion for a new trial should have been granted as appellant was thereby prejudiced, and this court should properly reverse the judgment of conviction.

In closing this portion of appellant's brief, we direct the court's attention to the statement of the Circuit Court in the case of *Little v. United States,* 73 F. 2d 861, at page 866, wherein this court stated that the measure or nature of the prejudicial error required to justify reversal was as follows:

> ". . . within the range of a reasonable possibility [it] may have affected the verdict of the jury, [and] appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. So to hold would, as a practical matter, take from a defendant his right to a fair trial."

Conclusion.

We again want to point out to the court that any error in the trial of the instant case must be regarded as prejudicial for the reason that the evidence was highly conflicting. Appellant steadfastly maintained that he had told the truth to the grand jury and produced a substantial number of corroborating witnesses to establish the truth of his testimony. While this testimony was rejected by the jury, this court should carefully scrutinize the testimony of the three barbers which we feel is not evidence of any kind because it is confused, contradictory within

itself and highly uncertain to the essential ingredient of the date here in question, *viz.* February 28, 1950. Add to this the other errors that we have pointed out and it is our sincere belief that more than error occurred at the trial—that there was a complete miscarriage of justice.

For the foregoing reasons, it is respectfully submitted that the judgment and order appealed from should be reversed.

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